In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

OREGON PACIFIC INDUSTRIES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

1. This is a direct appeal from the final judgment of a three-judge district court (J.S. App. 19–20) setting aside a "car service" order of the Interstate Commerce Commission (J.S. App. 21–24) issued without notice or hearing, pursuant to Section 1(15) of the Interstate Commerce Act, as amended, 49 U.S.C. 1(15). The Commission's order provides that carload shipments of lumber and plywood that are held at a reconsignment point for more than five days because

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of the shipper's failure to give instructions as to the final destination of the shipment are not entitled to the joint or through rate but are subject to the sum of the local rates.

A large proportion of lumber and plywood products produced in the northwestern United States is marketed through wholesalers who utilize a practice known as "sales-in-transit." This method permits the wholesaler to ship carloads of lumber and plywood to a reconsignment or "hold" point, where the shipment is held until the shipper concludes a sale and notifies the railroad of the shipment's final destination. Under rail tariffs duly filed with the Commission, these shipments move on a joint or through shipping rate from the point of origin to the ultimate destination. A joint shipping rate is always substantially lower than the combined or aggregate of shorthaul rates between intermediary points (see J.S. App. 13). When the shipper is notified that the cargo has arrived at the hold point, he must advise the railroad of the shipment's final destination within 24 hours. If he fails to do so, the shipment is subject to demurrage charges.

The Commission's order in this case was based on its view that the existing demurrage charges and other detention rules were inadequate to deter the undue detention of railroad cars in a time of severe car shortage. But, rather than limiting the permissible period of detention or otherwise directly regulating the railroad's disposition of cars used to transport lumber and plywood, the Commission undertook to change the rate structure that makes it economically

feasible for shippers to follow the practice of sales-in-transit. It ordered that any shipment detained at a hold point for more than five days must be charged local rather than through rates.

The Commission acted summarily, without notice or hearing, invoking its emergency authority under Section 1(15) of the Act, 49 U.S.C. 1(15), to enter summary orders with respect to "car service" when "immediate action" is required. The district court held, however, that the order is not a "car service" order within the meaning of Section 1(15) but rather a rate order within the scope of Section 15, 49 U.S.C. 15, which requires a prior opportunity for a "full hearing." The court stated that the order "does not purport to suspend any rule, regulation or practice * * * in connection with car service" (J.S. App. 16); rather, it "requires shippers employing this practice [of unduly detaining cars at hold points] to pay a higher ultimate shipping rate to the carriers" (*id.* at 17). The court held that the Commission has no authority under Section 1(15) to issue a rate order without notice and hearing.[1]

2. Although the United States supported the Commission in the district court, we have reconsidered our position in the light of the court's decision. We conclude that the decision is correct and that it presents no substantial question warranting plenary consideration by this Court.

[1] The court left open the question of what "authority the Commission may have to alleviate the problem of car shortages by prescribing shipping rates and charges through appropriate procedures, with notice and hearing" (J.S. App. 14).

The Commission contends that its emergency "car service" authority under Section 1(15) of the Act empowers it to change applicable rates and charges in response to an emergency car shortage. But that Section provides only that, in a transportation "emergency requiring immediate action," the Commission may, without notice or hearing, "suspend the operation of any or all rules, regulations, or practices then established *with respect to car service*" and "make * * * just and reasonable directions *with respect to car service* without regard to the ownership as between carriers of locomotives, cars, and other vehicles" (emphasis added). The Commission's authority to prescribe just and reasonable rates, on the other hand, is conferred by Section 15 of the Act, 49 U.S.C. 15, which requires an opportunity for a "full hearing."

The district court correctly concluded that Section 1(15) is not an exception to Section 15's hearing requirement. "Expressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language" (J.S. App. 17).

It is no answer to say that "the shipper retains complete initiative and option as to what rate he will pay" (J.S. 8). As the Commission itself acknowledges, "the order necessarily had to suspend temporarily the underlying tariffs" (J.S. 7). The district court correctly held that an order suspending tariffs is a rate order that can only be issued under Section 15. That the order provides a means of avoiding the increased rate does not change its character as a rate order.

Nor does the district court's decision "significantly weaken * * * the Commission's power to direct car service in the public interest" (J.S. 9). The Commission has emergency authority under Section 1(15) to suspend any practice with respect to car service, and we assume that the statute would permit it to preclude or closely regulate the practice of sales-in-transit. It also has authority to enter a rate order like the one in this case, if, after a hearing, it concludes that its objective can best be accomplished through rate inducements.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974